IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

NO.

HOWARD R. MARSHALL, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above case on July 26, 1961, which affirmed a judgment of the United States District Court for the District of Colorado, convicting petitioner, after a jury trial, on two counts of an information charging violation of 21 U.S.C., Sec. 331(k) by the dispensing of a drug allegedly within the meaning of 21 U.S.C. Sec. 353 (b)(1)(B).

CITATIONS TO OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals is printed and appended herein as Appendix A, *infra*, p. 13, but has not as yet been reported.

JURISDICTION

The judgment of the Court of Appeals is dated and was entered on July 26, 1961. Jurisdiction of this Court is conferred by 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court did not err in denying petitioner's motions to remove the question of entrapment from the consideration of the jury and for a directed verdict of acquittal because of entrapment as a matter of law in that petitioner had been induced by a government agent to dispense prohibited drugs contrary to statute at times when the petitioner was in an extremely abnormal physical and mental condition, which condition was apparent and known to the government agent.

2. Whether the trial court did not err in failing to direct a verdict of acquittal upon the failure of the government to prove that the drug in question fell within the prohibition of the statute at the time of the dispensing.

STATUTES INVOLVED

21 U.S.C. 353 (b) (1)(B) is set forth herein as Appendix B.

STATEMENT OF THE CASE

The petitioner was previously convicted of the same offenses but the conviction was reversed by this Court and the cause remanded for new trial because of prejudicial publicity received by the jury during trial.[1] *Marshall v. United States*, 360 U.S. 310. Certiorari was denied on the previous appeal as to entrapment, October Term, 1958, No. 383, but matters known to the government at the time of the first trial but unknown to petitioner's counsel came out at the second trial as a result of information contained in statements produced on demand pursuant to 18 U.S.C. 3500, which matters are crucial to the question of entrapment and are hereinafter set forth.

The evidence as to dispensing dextro-amphetamine sulfate.

The evidence on dispensing was similar at the first trial (both on direct and cross-examination) to the evidence at the second trial produced on direct examination. This evidence showed that the government agent Keating met the petitioner in the petitioner's home in Denver, Colorado, April 18, 1956, at which time Keating was introduced to the petitioner by an alleged mutual friend. Social conversation took place at which time Keating told petitioner that he was a salesman for an automobile parts firm and momentarily expected to make a business trip to Texas. (R. 15-17).

On April 23, 1956, Keating again came to petitioner's home in the evening and after some social conversation told the petitioner that he, Keating, had to be in Dallas,

---

[1]A six month sentence imposed after the first trial was increased to one year after the second trial though nothing is shown in the record to indicate the reason therefor.

Texas, the following day and that he would have to start driving to Texas that evening. Keating asked the petitioner for some benzedrine to help him stay awake during the drive. Petitioner refused and suggested Keating use No-Doz and coffee but Keating indicated he had previously tried it and had still been sleepy during the trip. The petitioner again suggested No-Doz and coffee. After these requests and refusals and a discussion as to the pros and cons of No-Doz, Keating and the petitioner went over a map to select the best route to Dallas. After Keating had picked out a route, he left petitioner's apartment and was met outside by petitioner who handed Keating several dextro-amphetamine sulfate tablets and several sleeping capsules. After offering payment several times which payment was refused, Keating left. Later Keating mailed petitioner two dollars. (R. 17-20).

On May 1, 1956, Keating again visited the petitioner in petitioner's home. Discussion took place about the alleged trip to Dallas, the help the tablets had been, and Keating stated that he was on his way to Los Angeles. As Keating got up to leave, petitioner asked him what his problem was to which Keating answered that the tablets had been of great help and wanted some more tablets and capsules. Keating returned the evening of the same day, received 50 dextro-amphetamine sulfate tablets and 24 sleeping capsules, asked petitioner as to payment, the petitioner asked Keating if $15.00 would be all right, Keating said it would and paid $15.00. (R. 21-25).

Evidence as to the Petitioner's condition.

After Keating testified on direct examination (and left the impression that petitioner was in a normal condition) his "Jencks" statute statements (18 U.S.C. 3500)

were demanded by petitioner's counsel and the new matter was discovered showing petitioner to have been in an extremely abnormal condition. Part of the matter contained in these statements was brought out on cross examination of Keating as follows:

(R. 86):

"Q. Did you notice anything else about Mr. Marshall that night the 18th of April, 1956? A. Well, I noticed that he seemed to have difficulty walking and talking."

"Q. Was he staggering? A. A bit, yes, sir."

"Q. A bit. How was his speech? A. I would describe it as being rather slurred or thick tongued."

"Q. Would you say that it appeared hard for him to coordinate? A. Yes."

"Q. What about his eyes, were they normal, or were they glassy, or what? How would you characterize his eyes? Can you recollect now? If you can't just say so? A. I believe I would like to refer to the notes I made after this occasion. I can't recall whether or not I made a notation of the condition of his eyes."

* * *

"Q. His physical appearance? A. Other than the matters that I have already discussed, I noticed nothing else that I can recall."

"Q. Can you characterize he had a slight stagger' A. Would I characterize it, did you say?"

"Q. Yes. A. Well, he did stagger as he entered the room and left."

Q. Was it much of a stagger? A. Yes. I would say so."

"Q. As a matter of fact would you say this is so.

that he staggered so much that he had to hold on to a door? A. Yes, as he entered the room he staggered against the doorway and had to hold on to the door for support."

(R. 87):

"Q. (By Mr. Francis) Do you recollect now what the condition of the defendant's eyes were that evening according to your recollection? Yes, I believe they were on this occasion quite red and glassy, sort of glossy appearance to them."
"Q. Almost shut? A. Now, as to that I can't recall."

(R. 88):
"Q. (By Mr. Francis) Now, does that refresh your recollection as to his eyes? A. Yes.
"Q. And, now, having refreshed your recollection what further can you say about his eyes? A. They were red and inflamed, or —
"Q. Almost shut? A. Almost shut, yes."

(R. 90):
"Q. How was Mr. Marshall's speech on the evening of April 23, 1956? A. Again it was rather slurred or thick-tongued as I have described it, not quite as much so as on the previous occasion."
"Q. You say he was exhibiting somewhat similar outward effects that he had exhibited on the 18th of April, 1956? A. Similar, but somewhat less severe I would say."

(R. 95, 96):
"Q. Now, again Mr. Keating, yesterday you gave testimony about the occurrence of May 1, 1956? A. Yes, sir,

"Q. You didn't tell us yesterday what his — Mr. Marshall's physicial condition was according to your best recollection, did you? A. No, I made no such reference in my testimony yesterday."

* * *

"Q. (By Mr. Francis) What was Mr. Marshall's appearance May 1, 1956? A. Well, again on this occasion he was quite thick-tongued. It was quite difficult for him to talk and he had difficulty standing erect without wobbling in his walk, and his coordination seemed to be impaired, whatever the reason was. As I arrived, he was trying to butter some sweet rolls sitting on the couch in the living room having extreme difficulty in manipulating the knife through the butter and back onto the rolls.

"Q. Even sitting down he seemed to stagger I believe you would say, is that not so? A. Yes."

* * * *

(R. 97):

"A. These tablets were given to me outside of his apartment door in the hallway.

"Q. And, was he still in a bad condition? A. He was having difficulty, yes.

"Q. You were aware of that at the time? A. Yes, sir.

"Q. In fact he had to lean on the signpost while he was talking to you downstairs, didn't he, that night? A. Yes, sir. We were out on the sidewalk.

"Q. He had to lean on the signpost according to your recollection? A. Yes, that is true.

"Q. Then he told you he didn't know of any law

which said he couldn't give them to you? A. Yes, there (sic) were his words.

Q. While he was talking to you downstairs he was mumbling, was he? A. Oh, on one occasion he stopped talking to me and seemed to be thinking out loud to himself unintelligibly, utterings of his I couldn't understand them."

The government on redirect examination of Keating discounted the possibility that the petitioner's condition was due to alcohol, its theory being (and this theory was unopposed by petitioner) that petitioner was under the influence of the drug dispensed.[2] (R. 100-101, 113). Petitioner did not take the stand.

As proof that dextro-amphetamine sulfate was a drug within the prohibition of 21 U.S.C. 353 (b) (1) (B), the government submitted the testimony of two physicians whose testimony was predominantly in the present tense (the trial took place April, 1960). At the conclusion of testimony of each physician, the following questions and answers were given:

"Q. What is that opinion? A. I believe the drug should be so restricted." (R. 108).

Q. I asked you the question whether or not, Doctor, this drug, dextro-amphetamine sulfate, should be dispensed without the supervision of a licensed practitioner? A. This of course would be inconsistent with what I have already said." (R. 82).

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[2]Further details as to petitioner's condition and the cause therefor are set forth in Keating's statements under section 3500.

REASONS FOR GRANTING THE WRIT

1. The issues in this case are importantly involved in the basic doctrines which have been the genesis of the rules set forth by this Court and other federal courts with respect to the law of entrapment and the role of the federal courts in the administration of criminal justice where entrapment is involved. The ruling of the lower court is in conflict with the decisions of this Court relative to entrapment. Basic to the law of entrapment as set forth by this Court are two notions: (1) the conduct of the government agent; and (2) the predisposition of the accused. The case is of importance for as it stands the federal judiciary condones the conduct of Keating in not finding that entrapment existed as a matter of law.

This Court has taken a strong stand against "objectionable police methods" and indicated that the conduct of the government agent who induces another to commit crime can result in entrapment being established as a matter of law. *Sherman v. United States*, 356 U.S. 369, 372, 373 (the entrapped person also being under the influence of drugs); and cf. *Sorrells v. United States*, 287 U.S. 435, 442. When Keating found the petitioner in his abysmal condition, it must have been obvious to him that the petitioner lacked the capacity to resist the appeal to sympathy and thus "avoid crime through self-struggle". *Sherman v. United States*, *ibid* at p. 384 (concurring opinion). The conduct of the government agent in this situation cannot be condoned. *Olmstead v. United States*, 277 U.S. 438, 470 (Justice Holmes dissenting). Nor was Keating's interest in seeing that justice be done. *Berger v. United States*, 295 U.S. 78, 88.

The failure of the district court to find entrapment

as a matter of law is in violation of the other basic doctrine established by *Sherman* and *Sorrells*, *supra*, for it has there been established that a person is entrapped as a matter of law if he is not predisposed to commit the offense charged. One who can barely press his knife through butter and then butter a sweet roll, who seems to stagger even sitting down, and who gives forth with unintelligible utterings and mumblings is hardly criminally disposed. A state of partial intoxication under analagous circumstances has been thought sufficient to warrant a district court to refuse a plea of guilty and to direct a dismissal on grounds of entrapment, *United States v. Echols*, 253 Fed. 862 (D.C. Tex.) cited in the *Sorrells* case, twice by the majority, page 443, footnote 4, page 444, footnote 5, and once by the concurring opinion, page 457, footnote 8.

The decision below should be reversed in that it has decided an important question of criminal law concerning entrapment contrary to the decisions of this Court.

2. This Court has not ruled, as far as petitioner can discover, what proof must be made by the government to establish what drugs come within the prohibition of 21 U.S.C. 353 (b) (1) (B). The Congressional history of the statute is set forth clearly and concisely in the United States Code Congressional and Administrative Service 1951, Vol. 2, pp. 2454-2464 inclusive. It and a reading of the statute indicates: 353 (b) (1)(A) prohibits a dispensing of habit forming drugs without a prescription and habit forming or hypnotic substances are itemized in 21 U.S.C. 352 (d). 353 (b) (1)(C) applies to new drugs which cannot be introduced into interstate commerce without previous application to and permission of designated federal authority. No drugs are listed in 353 (b)(1)(B)

nor was there proof that the instant drug was, by interpretative administrative regulation considered to be within the prohibition of subsection (B) in 1956. The House committee itself had misgivings over this subsection because of the omission in the statute of a requirement providing for administrative listing of so-called dangerous drugs.

Under the government's theory below and as argued in the Court of Appeals, proof is to be made through expert testimony to establish that a drug comes within category (B). If such is the case then there was a failure of proof as to this crucial burden since the two experts testified in the present tense that in their opinion the drug in question came within the prohibition of category (B). But assuming such testimony does not violate due process, *Connally v. General Construction Company*, 269 U.S. 385, 392; *Winters v. New York*, 333 U.S. 507; *Lanzetta v. New Jersey*, 306 U.S. 451, it is insufficient for the expert to testify as to his opinion in 1960 since it cannot be applied retroactively or backwards by presumption to 1956 anymore than it could be applied forwards by presumption to overcome the presumption of innocence. *Parlton v. United States* 75 F.2d 772, 776 (C.A.D.C.); *W. F. Corbin v. United States*, 181 Fed. 296, 304 (C.C.A. 6). The testimony of the expert, if competent, would have to be fixed as to April and May, 1956.

This Court should determine whether expert testimony is permissible to fill in the omission of the statute, whether the testimony herein is competent and whether it may be applied retroactively.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6500 — June Term, 1961

Howard R. Marshall,
Appellant,

v.

The United States of America,
Appellee.

} Appeal from the United States District Court for the District of Colorado.

Filed July 26, 1961.

George J. Francis for Appellant.

Arthur A. Dickerman (Lawrence M. Henry, United States Attorney and Richard P. Matsch, Assistant United States Attorney, were with him on the brief) for Appellee.

Before Phillips, Pickett and Lewis, Circuit Judges.

Lewis, Circuit Judge.

Appellant has now been twice tried and twice found guilty by juries upon each of two counts of an information charging violation of the Federal Food, Drug and Cosmetics Act, 21 U.S.C.A. § 301, et seq. This court's affirmance of the judgment of conviction obtained at the first trial, 258 F. 2d 94, was set aside because of extran-

cous events occurring during the course of that trial which irretrievably prejudiced appellant, 360 U.S. 310, 79 S. Ct. 1171, 3 L. Ed. 2d 1250. Such extraneous events (interference by newspapers) did not recur and the instant appeal is now presented to us upon issues substantially the same as the remaining ground which we earlier considered and rejected and upon which review was sought in the Supreme Court but refused. 358 U.S. 892, 79 S. Ct. 153, 3 L. Ed. 2d 120. Appellant again challenges the sufficiency of the evidence to sustain conviction and again asserts that the court erred in refusing to hold that entrapment was established as a matter of law.

The premise of this prosecution was an alleged violation of the prohibition set forth in 21 U.S.C.A. 353 (b)[1] through the unlawful dispensing of the drug dextro-amphetamine sulfate. To prove the drug to be within the compulsion of the statute the government relied upon the uncontradicted testimony of a number of expert witnesses

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[1] 21 U.S.C.A. 353(b)

(1) A drug intended for use by man which

• • •

(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug . . .

• • •

shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug, or (ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or (iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

who described in detail the danger of the indiscriminate use of the drug and the necessity of control through sale only by direction of a competent physician. Complaint is now made that such proof was made through testimony given largely in the present tense at time of trial (1960) and was incompetent to prove the commission of a crime occurring in 1956. We find no merit to the contention. The fair import of the testimony indicates that the effect of the drug upon the human body and upon human behavior is now, and always has been, potentially harmful. Indeed, this fact was known to the appellant for he cautioned his buyer:

> "Don't take them in larger doses because you will begin to get nervous and experience anxiety and get to grinding your back teeth . . . ."

Opinion evidence, given in the present tense, may indeed be incompetent to prove an earlier fact. Opinions change through additional learning or experience. The medical profession is undoubtedly more aware now than it was in 1956 of the dangers in the excessive or casual use of amphetamine. This knowledge, together with the discovery of other drugs having similar benefits but more moderate side effects, has led to the less frequent prescribing of amphetamine. But this development can give no comfort to appellant for the record indicates that in 1956 the drug was considered unsafe for indiscriminate use. One witness testified that the drug had been under prescription for ten or fourteen years.

Our earlier opinion details the evidence relating to the claim of entrapment as given at the first trial, 258 F. 2d 94. The testimony at the present trial was substantially the same but did, upon cross examination, develop

the further fact that appellant Marshall was physically disturbed at the time of the commission of the offenses. The record is silent as to the cause of Marshall's condition and there is nothing to indicate any factor beyond the inference of self-indulgence in drug or alcohol. No claim is made that the government contributed to Marshall's condition and such condition can be no more than a single circumstance proper to consider in the course of events leading to the sale of the contraband drug. Certainly self-impairment of physical or mental ability cannot, alone, result in entrapment as a matter of law and cannot, alone, "protect the guilty from the consequences of subjectively mistaking apparent for actual opportunity to safely commit crime." Marshall v. United States, 258 F. 2d 94, 97.

We again conclude that the evidence did not establish entrapment as a matter of law and that the issue, having been submitted to the jury upon instructions identical to those given in the first case, was considered without prejudice to appellant. The court's instructions were deemed "appropriate" by the Supreme Court. Marshall v. United States, 360 U.S. 310, 311.

Finally, appellant charges error in the trial court's refusal to allow challenges for cause to two government employees called as prospective jurors. The ruling of the court was correct. A government employee is not disqualified from sitting as a juror in a criminal case simply because of the generality of his employment. Baker v. Hudspeth, 10 Cir., 129 F. 2d 779, cert. den. sub nom. Baker v. Hunter, 317 U.S. 681; United States v. Wood, 299 U.S. 123, 57 S. Ct. 177, 81 L. Ed. 78.

AFFIRMED.

APPENDIX B

Section 353(b)(1)(B) provides:

(1) A drug intended for use by man which —

(B) because of its toxicity or other potentiality for harmful effect, or the method of its use, is not safe except under the supervision of a practitioner licensed by law to administer such drug.